No. 87-764

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IN THE

Supreme Court of the United States

October Term, 1987

STATE OF FLORIDA,
Petitioner,
vs.
MICHAEL A. RILEY,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF AMICI CURIAE

BRIEF OF THE STATE OF INDIANA AND THE COMMONWEALTHS AND STATES OF ALABAMA, ARIZONA, ARKANSAS, CONNECTICUT, DELAWARE, HAWAII, IDAHO, ILLINOIS, KANSAS, KENTUCKY, MICHIGAN, MINNESOTA, MISSOURI, NEBRASKA, NORTH CAROLINA, OHIO, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, WISCONSIN AND WYOMING

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QUESTION PRESENTED

Whether the ruling of the Florida Supreme Court that warrantless aerial observations, from a helicopter at an altitude of 400 feet, of a greenhouse within the curtilage of a home violates the Fourth Amendment conflicts with *California v. Ciraolo*, 476 U.S. 207, 106 S. Ct. 1809 (1986).

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STATEMENT OF THE FACTS

In August, 1984, the Pasco County Sheriff's Office received

an anonymous tip regarding marijuana growing on the Respondent's property. The Respondent rented approximately five acres of rural property on which was located a mobile home which he used as a residence. A greenhouse was ten to twenty feet behind the mobile home. Deputy Sheriff Kurt Gell conducted a ground level investigation but was unable to discern the contents of the greenhouse from the road. Consequently, Gell secured a helicopter and flew over the Respondent's property at an altitude of 400 feet. Through openings in the greenhouse's roof, Gell identified marijuana plants. Gell obtained a search warrant based on an affidavit which described the anonymous tip and the aerial observation. When Gell executed the warrant, he seized forty-four (44) marijuana plants and arrested the Respondent for the unlawful manufacture and possession of marijuana.

The trial court granted the Respondent's motion to suppress the evidence on the ground that the Respondent manifested a reasonable expectation of privacy from aerial surveillance. The Florida Court of Appeals, however, reversed the trial court's order and certified the issue to the Florida Supreme Court. The Florida Supreme Court reversed the Florida Court of Appeals and ruled that the Respondent had a reasonable expectation of privacy in the greenhouse and its contents from the aerial observations of a police officer flying in a helicopter at an altitude of 400 feet.

INTEREST OF AMICI CURIAE

Law enforcement agencies have increasingly employed aerial surveillance in order to detect illegal activities.[1] Aerial

[1] In 1987, the Drug Enforcement Administration sponsored twenty-one (21) marijuana eradication seminars. Approximately 600 officers from state and federal agencies attended the seminars which included instruction on, among other things, aerial detection and photography. Also, the D.E.A. aviation unit, alone, flew 210 missions; totalling 632.1 flying hours. *See* U.S. Dept. of Justice, 1987 Domestic Cannabis Eradication Suppression Program Final Report (1987).

surveillance is an effective law enforcement tool in curtailing the cultivation and distribution of marijuana. Statistics on the eradication of marijuana underscore the interest of the states in this area. Law enforcement agencies in the fifty states destroyed 7,432,834 cultivated marijuana plants and 3,105,460 wild marijuana plants in 1987.[2]

When presented with the use of aerial observations by police officers, courts had been unable to establish a consistent method of analysis to determine whether warrantless aerial surveillance constituted an unreasonable search under the fourth amendment.[3] In *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809 (1986), however, the United States Supreme Court gave lower courts a workable guideline to follow when confronted with aerial surveillance cases. First, it must be determined whether the area observed is located within the curtilage or in an open field. *Id.* at 212-213, 106 S.Ct. at 1812. If the area searched is within the open field, the warrantless observation is valid *per se* under the reaffirmation of the open fields doctrine set forth in *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735 (1984). If the area is within the curtilage, the two-part test set forth in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507 (1967) must be considered: (1) whether a person exhibited an actual (subjective) expectation of privacy; (2) whether the expectation is one that society is prepared to recognize as reasonable. *Id.*[4] Applying the foregoing test to the facts in *Ciraolo*, the United States Supreme Court upheld the

[2] U.S. Dept. of Justice, 1987 Domestic Cannabis Eradication Suppression Program Final Report (1987).

[3] *See* Note, The Fourth Amendment in the Age of Aerial Surveillance: Curtains for the Curtilage?, 60 N.Y.U.L. Rev. 725, 739-750 (1985).

[4] "Accepting, as the State does, that this yard and its crop fall within the curtilage, the question remains whether naked-eye observation of the curtilage by police from an aircraft of 1,000 feet violates an expectation of privacy that is reasonable." *Id.*

warrantless, physically nonintrusive observation of the curtilage of a residence from an aircraft lawfuily operating within the public navigable airspace.

The Florida Supreme Court, in the instant case, ruled that the Fourth Amendment was violated since the helicopter was not in public navigable airspace because it was below the minimum altitude level for fixed-wing aircraft. The amici curiae submit that the Florida Supreme Court's interpretation of *Ciraolo* is unduly narrow. The *Ciraolo* Court cited the factor of airspace to emphasize that the plane had a right to be where it was in observing the marijuana. *Ciraolo* should not be read to apply only to helicopters flying at an altitude of 1000 feet. In *Ciraolo*, the Court examined the interests of the individual and law enforcement to determine whether a reasonable expectation of privacy existed. The standard to resolve warrantless aerial surveillance cases, enunciated in *Ciraolo*, strikes an appropriate balance between the preservation of constitutionally guaranteed privacy and legitimate law enforcement technique.

SUMMARY OF ARGUMENT

The flexible guidelines for aerial surveillance cases set forth in *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809 (1986) ensures that a balance is maintained between effective law enforcement and the individual's right of privacy.

ARGUMENT

In *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809 (1986), the United States Supreme Court, applying the two-prong test set forth in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507 (1967), upheld the warrantless, physically nonintrusive observation of the curtilage of a residence from an airplane lawfully operating within public navigable airspace. *Katz* established the reasonable expectation of privacy as the touchstone of fourth amendment analysis. *Katz* posits a two-part inquiry: (1) whether a person has exhibited an actual (subjective) expectation of privacy and (2) whether the expectation is one that

society is prepared to recognize as reasonable. See *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580 (1979). In *Ciraolo*, the court conceded that Ciraolo manifested a subjective expectation of privacy from street-level observations since he had erected a ten foot fence. The court, however, questioned whether Ciraolo had a subjective expectation that his yard would not be viewed from some other vantage point.

In applying the second element of the *Katz* test, the court examined the curtilage doctrine.[5] Although Ciraolo's yard was within the curtilage of his home, the fence did not bar all observations by the police. The court opined that even though an individual manifests his expectations of privacy by taking measures to restrict some views of his activities, such measures do not prevent a police officer from making observations from a public vantage point where he has a right to be. The public vantage point in *Ciraolo* was the navigable airspace in which the officers flew to view Ciraolo's yard. The court further explained that any member of the public flying in the airspace could have observed what the officers viewed. The court concluded that because the officers viewed the curtilage from a public vantage point, their aerial observations were not protected by the fourth amendment.

The standard of review for aerial surveillance cases enunciated in *Ciraolo* properly assesses the interests of the individual and law enforcement to determine whether a reasonable expectation of privacy exists. In *Ciraolo*, the court balanced the nature of the property observed against the surveillance method employed. In evaluating the intrusiveness of the sur-

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[5] Regarding the curtilage doctrine, the court stated:

> [T]he curtilage is the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life. The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened. (Citations omitted).
>
> *Ciraolo*, 476 U.S. at 212-213.

veillance, the court considered that the police observations occurred in navigable airspace.[6] Navigable airspace is that which Congress has placed in the public domain and which is airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority. *United States v. Causby*, 328 U.S. 256, 263, 66 S.Ct. 1062, 1067 (1946). The factors of navigable airspace and altitude, however, are not the critical factors in the decision. Rather, these factors were stated to emphasize that the airplane had a right to be where it was in observing the marijuana plants. Thus, *Ciraolo* should not be read to apply only to airplanes and helicopters flying at an altitude of 1000 feet.[7] Indeed, the following language from the opinion supports this interpretation: "Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he had a right to be and which renders the activities clearly visible." *Ciraolo*, 476 U.S. at 213, 106 S.Ct. at 1812.

Nevertheless, it is important to note that *Ciraolo* should not be construed to mean that all helicopter overflights at 400 or 500 feet are legal. Helicopters and airplanes have different

[6] In *Ciraolo*, the airplane flew at an altitude of 1000 feet. In congested areas, federal aviation regulations prohibit fixed-wing aircrafts from flying lower than 1000 feet above the highest obstacle. 14 C.F.R. § 91.79(b) (1986). In noncongested areas, an aircraft must be operated above an altitude of 500 feet. 14 C.F.R. § 91.79(c). Helicopters may be operated at less than the minimum altitude "if the operation is conducted without hazard to persons or property on the surface." 14 C.F.R. § 91.79(d).

[7] In the instant case, the Florida Supreme Court observed:

> Indeed, we note the care taken to qualify and limit the permissible observation to the "naked-eye" from "navigable airspace" at an "altitude of 1000 feet" in a "physically nonintrusive manner" . . . We simply cannot dismiss as irrelevant the difference between a fixed-wing aircraft flying at 1000 feet and a helicopter circling and hovering at 400 feet so that its occupants can look through an opening in the roof.

Riley v. State, Fla., 511 So.2d 282, 287 (1987).

capabilities. The helicopter, however, can conduct more intrusive-type flights. See *People v. Romo*, 198 Cal. App. 3d 581, 243 Cal. Rptr. 801 (1988). Therefore, in analyzing the reasonableness of helicopter overflights, the standard of review set forth in *Ciraolo* should be applied in conjunction with a consideration of the following factors: ". . . the total number of instances of surveillance, the frequency of surveillance, the length of each surveillance, the altitude of the aircraft, the degree of disruption of legitimate activities on the ground, and whether any flight regulations were violated by the surveillance." *Giancola v. State of W. Va. Dept. of Public Safety*, 830 F.2d 547, 550-551 (4th Cir. 1987).

CONCLUSION

The judgment of the Supreme Court of Florida should be reversed.

Respectfully submitted,

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